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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ESTEBAN JUAN PRICE, Appellant.	2 CA-CR 2009-0093 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20083387

Honorable Richard Nichols, Judge

AFFIRMED IN PART; VACATED IN PART

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B R A M M E R, Judge.

¶1 Esteban Price appeals from his convictions and sentences for three counts of aggravated assault. He argues the trial court erred by admitting into evidence a photograph because the state had not disclosed it timely, the photograph was irrelevant and prejudicial, and the state had failed to present adequate foundation for its admission. Price additionally asserts a police officer's testimony concerning another witness's statements violated his constitutionally guaranteed confrontation rights. Finally, Price contends the court erred by assessing a time payment fee at sentencing. We affirm his convictions, vacate the time payment fee, and affirm his sentences as modified.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Price's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On August 22, 2008, J. and A. were riding in a car driven by J.'s girlfriend, K. A Chevrolet Caprice, driven by Price, moved in front of them, and K. honked the horn. The occupants of the Caprice "flipped [them] off," and J. returned the gesture. When Price moved the Caprice into a lane next to K.'s car, J. exchanged words with the Caprice's occupants. Price then followed K.'s car to a parking lot. After K. parked the car, a passenger in the Caprice got out of the car wielding a shotgun. Price also got out of the car and beat J. with a revolver, knocking him to the ground. Price then took a gold chain from around J.'s neck. Price and his companion fled in the Caprice but were later arrested at an apartment complex. Police found the Caprice nearby; a shotgun

and revolver were located inside the car. Price told police he had loaned the car to two other individuals earlier in the day.

¶3 A grand jury charged Price with one count each of aggravated robbery and armed robbery and three counts of aggravated assault. After a three-day trial, the jury acquitted him of the robbery counts but found him guilty of all three counts of aggravated assault. The trial court sentenced him to concurrent, presumptive, 7.5-year prison terms for each count. The court also ordered Price to pay $400 in attorney fees, a $25 "Indigent Administrative Assessment fee," and a $20 time payment fee. This appeal followed.

Discussion

Admission of Photograph

¶4 Price told police officers he had loaned the Caprice to a man named Ordell Williams. Before trial, the state disclosed a photograph it intended to introduce into evidence. The caption on the photograph stated "Colley Odell Rivers."[1] The state asserted Williams and Rivers were the same person. Price moved to preclude the photograph, arguing it had not been disclosed timely and, in any event, was irrelevant and prejudicial. The trial court denied the motion and admitted the photograph in evidence during testimony by police detective Linda Contreras. When the victims were shown the photograph, they testified that the man pictured was not one of the men who had assaulted them. Both on the day of the incident and at trial, each of the victims identified

[1]The caption of the photograph bears the name "Colley Odell Rivers." Below, however, the state and Price referred to the person in the photograph as being Ordell Ribers.

Price as one of their assailants. We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Blakley*, 204 Ariz. 429, ¶ 34, 65 P.3d 77, 85 (2003).

¶5 Price first argues the trial court was required to preclude the photograph because the state had not disclosed it in a timely fashion. The state asserted at trial that it had, but Price disagreed, stating he had received the photograph only four days before trial. The state's initial disclosure statement and list of potential exhibits do not list the photograph specifically, and we find no other disclosure statements in the record. Rule 15.6(d), Ariz. R. Crim. P., requires a party seeking to admit evidence "not disclosed at least seven days prior to trial" to "obtain leave of court by motion, supported by affidavit, to extend the time for disclosure and use the material or information." If the court finds the evidence "could not have been discovered or disclosed earlier even with due diligence and the material or information was disclosed immediately upon its discovery," it must grant an extension to complete disclosure and permit use of the evidence. *Id.*

¶6 Assuming, arguendo, that the photograph was not disclosed timely, neither did the state seek leave of court to extend the time for disclosure, nor does the record suggest the evidence could not have been discovered and disclosed earlier. But we disagree with Price that the court therefore was required to preclude the evidence. Rule 15.6(d) states that, absent a finding the evidence could not have been disclosed earlier, the court "may either deny leave or grant a reasonable extension to complete the disclosure and leave to use the material or information" and, if granting leave, "may

impose any sanction other than preclusion or dismissal listed in Rule 15.7." Thus, by its plain language, Rule 15.6(d) does not require the court to preclude the evidence even when a party does not attempt to make the required showing. Instead, that decision is within the court's discretion. Price does not explain how he was prejudiced by the state's apparently late disclosure, nor is any prejudice apparent from the record. *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996) (preclusion of evidence rarely appropriate sanction; trial court does not abuse discretion in denying sanction if court "believes the defendant will not be prejudiced"). Accordingly, we find no abuse of discretion in the court's decision to permit the state to introduce the photograph at trial.

¶7 Price additionally contends the photograph was inadmissible because it was both irrelevant and unduly prejudicial. *See* Ariz. R. Evid. 401-403. Contreras testified she had concluded that, based on Price's description, the "Ordell Williams" Price had referred to was a man she knew as Ordell Rivers and that the photograph was of Ordell Rivers. In light of the victims' testimony that the person in the photograph was not one of their assailants, the photograph was clearly relevant to rebut Price's statement that he had loaned the car to another person at the time of the assaults. Nor was the photograph unduly prejudicial, as it did not "ha[ve] an undue tendency to suggest [a] decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997); *cf. Onujiogu v. United States*, 817 F.2d 3, 6 (1st Cir. 1987) (all evidence against defendant meant to be prejudicial; Rule 403, Fed. R.

Evid., designed to prevent only unfair prejudice). Its admission did not, as Price suggests, "unfairly" portray him as a liar.

¶8 Finally, Price asserts the state failed to provide an adequate foundation for the photograph's admissibility because the state did not establish it was a photograph of the man to whom Price had claimed he had loaned his car and because Contreras did not know when the photograph had been taken. But, as we noted above, Contreras testified the photograph was an accurate depiction of Ordell Rivers, and she had concluded Ordell Rivers was the man to whom Price had referred. Her testimony was sufficient to permit the jury to conclude the photograph was of the man to whom Price had claimed to have loaned his car. *See* Ariz. R. Evid. 901(a) (authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims"). Nothing more was required. That Contreras did not know when the photograph had been taken goes to its weight, not its admissibility. *See State v. Lacy*, 187 Ariz. 340, 349, 929 P.2d 1288, 1297 (1996) (lack of definite identification of footprint found at crime scene goes to weight of evidence, not admissibility); *State v. Jaco*, 156 S.W.3d 775, 778 (Mo. 2005) ("In general, differences in the conditions of the subject depicted between those conditions existing at the time of the crime and those at the time the photograph was taken go to the weight of the evidence, not admissibility."). For all the foregoing reasons, the trial court did not err in admitting the photograph into evidence.

Confrontation Clause

¶9 Price next asserts a police officer's testimony about statements a witness, F., had made to the officer violated Price's constitutional right to confront the witness. *See* U.S. Const. amend. VI; Ariz. Const. art. II, § 24. F. had called 911 during the incident and told the 911 operator he was following Price's car because its occupants had just committed an armed robbery. F. then approached a police officer who had been searching an apartment complex for Price, told the officer he had made the 911 call, and pointed out to the officer Price and the other assailant.

¶10 Four days after the incident, the officer telephoned F. and interviewed him. At trial, F. testified he had no memory of those events. A tape recording of the 911 telephone call was played during F.'s testimony, but F. maintained he could not remember anything about the incident. After F. finished testifying, the officer testified about statements F. had made during the telephonic interview. *See* Ariz. R. Evid. 801(d)(1)(A); *State v. King*, 180 Ariz. 268, 275, 884 P.2d 1024, 1031 (1994) (feigned lack of recollection properly impeached with prior statements); *State v. Navallez*, 131 Ariz. 172, 173, 639 P.2d 362, 363 (App. 1981) ("[I]t is not necessary that a witness be asked about prior inconsistent statements before extrinsic evidence of those statements may be admitted so long as the witness is given an opportunity to explain or deny the statements.").

¶11 Price asserts on appeal that the officer's testimony about F.'s statements during the telephonic interview violated his confrontation clause rights because F. was

not available for cross-examination concerning those statements. But nothing in the record suggests F. could not have been recalled for Price to cross-examine him, and Price did not seek leave to do so. Accordingly, Price waived his right to cross-examine F., and Price's right to confront adverse witnesses was not violated. *Cf. United States v. Darrell*, 828 F.2d 644, 650 (10th Cir. 1987) (right to cross-examine waived where defendant "failed to ask the court to recall the witnesses"); *United States v. Cook*, 530 F.2d 145, 153 (7th Cir. 1976) (when witness's testimony "cut off" after witness mentioned precluded information, right to cross-examine waived because defendant "did not request the district court to allow him to do so"); *Calvert v. United States*, 323 F. Supp. 112, 114 (D. Ky. 1971) ("Neither the court nor the prosecution is responsible for determining what witnesses the defendant should call."); *Blackwell v. United States*, 405 F.2d 625, 626 (5th Cir. 1969) (finding waiver where court excused witness after direct testimony and defendant failed to request cross-examination).

Time Payment Fee

¶12 As noted, the trial court assessed against Price a time payment fee "pursuant to A.R.S. [§] 12-116." We agree with the parties that the court was not permitted to do so. *State v. Connolly*, 216 Ariz. 132, 132-33, 163 P.3d 1082, 1082-83 (App. 2007). Although Price did not raise this issue below, a court fundamentally errs when it imposes an illegal sentence. *See State v. Zinsmeyer*, 222 Ariz. 612, ¶ 26, 218 P.3d 1069, 1080 (App. 2009). Accordingly, we vacate the time payment fee.

Disposition

¶13 We affirm Price's convictions for aggravated assault, vacate the time payment fee, and affirm his sentences as modified.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge